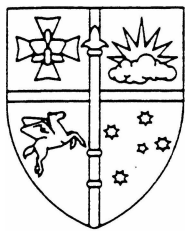


PANDORA'S BOX

AUGUST 1998

A PUBLICATION OF THE UNIVERSITY OF QUEENSLAND
WOMEN AND THE LAW SOCIETY

WATL would like to thank the



**Queensland
Law Society**

***for their ongoing generosity,
support and sponsorship of
Pandora's Box in 1998.***



WOMEN AND THE LAW SOCIETY
The University of Queensland

The Women and the Law Society (WATL) was formed in 1993 by a group of women law students concerned about gender inequity before the law, within the legal profession and within the law school. WATL's activities target both the university and the wider community. We aim to provide a support network for female law students and to serve as an informed voice about social justice and gender issues within the law school.

Through our various activities including discussion nights, the annual careers conference, our newsletter *Themis*, and of course *Pandora's Box*, WATL continues to provide a forum for discussion of issues pertaining to women's experience in the legal profession and the administration of justice.

WATL is proud to present the sixth Annual Women's Breakfast at the Marriott Hotel on Friday 21st August, with the prominent barrister and feminist author Dr Jocelynne Scutt, as the keynote speaker.

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EDITORIAL

Welcome to the 1998 edition of *Pandora's Box*.

This year we are fortunate to have collected articles from contributors with distinctly different roles within the law - High Court Justice, academic, barrister and police officer. Their varied perspectives have converged in this publication, producing a timely reminder of one indisputable truth- women in the law cannot lapse into complacency and resigned indifference. Women involved in the law must persevere in their criticisms of how the law impacts upon women in the various roles they play in both the private and public sphere.

The role of criticising what is accepted as the norm is often not an enviable position. It means risking ostracism and misguided ridicule. It is not a role for those weak of will and spirit. Thankfully the contributors to this year's Pandora's Box fulfil their roles with the strength of persistent determination.

Those who are bold enough to advance before the age they live in, and to throw off, by the force of their own minds, the prejudices which the maturing reason of the world will in time disavow, must learn to brave censure.

(Mary Wollstonecraft, *A Vindication of the Rights of Women* (ed. Carol H. Poston), London: Norton, 2nd ed., 1988).

We wish to give our sincere thanks to our contributors whose enthusiasm made this publication possible. Copyright remains with the authors, italicised introductions are merely editorial and the viewpoints expressed are personal to the authors. WATL also gratefully acknowledges the financial support of the Queensland Law Society. The editors would also like to thank Usha Praser, Carla Klease, Sonja Litz, Kate Raymond, Sabine Sand and Sally Geake for their time and dedication. A special thanks to Eliza Hess for her brilliant artwork.

Enjoy!

Marie Foyle and Katie Curchin
Editors

August 1998

SPEECH TO LAUNCH AUSTRALIAN WOMEN LAWYERS

*The Hon Justice Mary Gaudron, the first female justice of the High Court of Australia, welcomes the formation of a national women lawyers organisation seeing it as both an acknowledgement by women lawyers that they are different and an assertion of their right to be so.**

It is a little over two years since I read Helen Garner's thought provoking work *The First Stone*.¹ It prompted me to write a note to my colleague, the High Court judge, saying:

"The trouble with the women of my generation is that we thought if we knocked the doors down, success would be inevitable: the trouble with the men of your generation is that so many still think that, if they hold the doors open, we will be forever grateful."

Of course, those statements are open to criticism on the same basis as any other generalisation or over-simplification. Nonetheless, they seem to me to contain sufficient of the truth and sufficient relevance to bear repetition on the occasion of the launching of the Australian Women Lawyers. I say the statement bears relevance because I see the Australian Women Lawyers as the beginning of a new era for women and for women lawyers, an era in which people realise that equality, equal justice and equality of opportunity are complex ideas, difficult to implement and achievable only by the sustained efforts of those committed to those ideals. They are not achievable simply on the basis that the doors are open, be they held open or battered down.

It was in search of some assistance in door battering that, in company with a fellow student, Daphne Kok, I approached the Women Lawyers Association of New South Wales in March 1964, some 33 1/2 years ago. Daphne and I went along as representatives of female law students at Sydney University, many of whom had been tersely informed by city firms of that era that it was not their policy to employ women as articled clerks. The minutes of that meeting record that we were informed by the women practitioners whose assistance we sought that the solution lay in our own hands: we should learn to touch type; forego our university studies and undertake the Admission Board course; we should use our annual holidays to do the Admission Board Exams; then we would have no difficulty finding articles.

I left that meeting much encouraged. I knew, before the meeting, that for a woman to succeed, she had to be better than her male counterpart. I knew, after the meeting, that that was as simple as learning to touch type – hardly an insuperable task. And I knew, too, that the women who offered us that advice were speaking from their own experience: the hurdles they had to jump had been much higher than we were ever likely to confront. One of the women present at that meeting was Marie Byles, who, in 1924, became the first woman admitted to practice as a solicitor in New South Wales. It is appropriate, on an occasion such as this, that we acknowledge the pioneering spirit of those women who, a century or so ago, set about making a career in the law and the invincible determination of those who did.

Two of the earliest to attempt the study of law were Edith Haynes of Western Australia and Ada Evans of New South Wales. Ada's application to the New South Wales Supreme Court to be enrolled as a student-at-law was rejected on the ground that there was no precedent.² Conversely, Edith's application was accepted in Western Australia, but with a warning that her admission could not be guaranteed. The warning became reality when, in 1904, she unsuccessfully sought admission to undertake the intermediate law examinations. She later obtained an order nisi for mandamus. Her father appeared on the return of the order nisi, but it was discharged, it being held that although the *Legal Practitioners Act 1893* (WA) allowed for "persons" to be admitted, the court should not take the momentous step of acknowledging that a woman was a person without the authority of Parliament.³

* This article, based on a speech delivered to the Australian Women Lawyers in Melbourne, September 1997, is reprinted with permission of the *Australian Law Journal* ((1998) 72 ALJ 119) and the *Australian Women Lawyers*.

It was not possible to study law at the University of Western Australia until 1927, and the discharge of the order nisi on 9 August 1904 marked the end of Edith Haynes' legal studies.

In the meantime, in 1898 Ada Evans had enrolled at the Sydney University Law School during the absence overseas of the fearsome Professor Pitt Corbett, the then Dean of the Law School. Learning of her enrolment on his return, he summoned Ada to his office and, with a fine grasp of legal essentials, informed her that she did not have the physique for law and would find medicine much more suitable.⁴

Although Ada Evans graduated in law in 1902, she was not admitted until 1921: New South Wales did not pass legislation until 1918⁵ and it was then necessary for Ada to be enrolled as a student-at-law for two years before she could be admitted. New South Wales was exceedingly tardy in its enactment of legislation enabling women to be admitted to legal practice.

Legislation was passed in New Zealand in 1896,⁶ in Victoria in 1903,⁷ in Tasmania in 1904,⁸ in Queensland in 1905,⁹ in South Australia in 1911,¹⁰ and in Western Australia in 1923.¹¹ The Victorian legislation enabled the admission, in 1905, of Flos Greig as the first woman lawyer in Australia.

Agnes McWhinney became the first woman admitted in Queensland in 1915, Mary Kitson in South Australia in 1916, Alice May Cummins in Western Australia in 1930,¹² and Helen McPhee in Tasmania in 1935. Coincidentally, women could not be admitted to legal practice in the United Kingdom until 1921, the same year as Ada Evans became the first woman lawyer admitted to practice in New South Wales.¹³

Some idea of what was involved in the political struggle to secure legislation enabling women to be admitted to legal practice can, perhaps, be gauged from a passage in a book titled *Concerning Solicitors*, published anonymously in London in 1920. It contained this passage:

"It is difficult to understand why up to now there have been female surgeons, doctors and oculists in this country and female lawyers in many other countries, but no female lawyers in the United Kingdom. Clearly, both branches of the law offer as excellent an opening for the same type of celibate woman with exceptional talent as any other profession."¹⁴

The author supported his thesis with this interesting polemic:

"The truth is that the differences between sexes have been grossly exaggerated by priests, journalists and fools generally, and there can be no doubt that at least one percent of women are quite as intelligent as any man."¹⁵

New South Wales may have been slow in enacting legislation enabling women to be admitted to practice, but, in 1952, 22 women lawyers banded together to establish the Women Lawyers Association of New South Wales, the first of its kind in Australia.¹⁶

An association was formed in Tasmania in 1972, in Queensland in 1978, in Western Australia in 1982, in the Northern Territory in 1986, in the Australian Capital Territory in 1988, in South Australia in 1989 and, last but not least, the Victorian Women Barristers Association was formed in 1993 and the Victorian Women Lawyers Association in 1996.

Why a women lawyers' association?

It is, I think, a tribute to the women's movement, generally, and to the growing understanding that equality is a complex issue that membership of a women lawyers' association or, even, participation

in the activities of those associations is now regarded as professionally acceptable. It was not always so. Regrettably, it is not universally so even now.

Certainly, 30 years ago in New South Wales, many of the women entering practice rejected membership of the Women Lawyers' Association saying, "I'm a lawyer not a woman lawyer and I have no intention of being identified as such".¹⁷

It was an attitude born of the belief that I then shared, namely, that once the doors were open, women would prove that they were every bit as good, and certainly no different from their male counterparts. The truth is that in some respects, we are the same but, in others we are different. And when we admit that difference, when we assert our right to be different, we are going to be significantly better lawyers. Moreover, the legal profession is going to be a better profession and the interests of justice are going to be much better served.

But as I said, 30 years ago we had little understanding of difference, little incentive to admit it and it is little wonder that membership of a women lawyers association, involving as it did even a tentative assertion of difference, was seen by both male and female practitioners alike, as something that was not really professionally acceptable. Indeed that attitude persisted until very recent times.

It was as recently as October 1989 – not quite eight years ago – that I was travelling to Western Australia with my judicial colleagues in an Air Force aeroplane, the more normal method of transport not being available as a result of what some people describe as "the Pilot's Strike". There was a certain camaraderie in the aeroplane until, by way of general conversation, I informed my colleagues that I would be speaking to a gathering of women lawyers in Perth. It might have been better if I had started dancing the Can-Can.

It was clearly inappropriate for me to attend, much less speak at such a gathering; there was no need for women to have separate professional organisations; there was no discrimination in the legal profession; in any event, I was being discriminatory by attending and, by way of final judgment on the ignominy of what I was about to do, "not even Lionel would have done such a thing".

Their attitude was short lived, not because of anything I did but because they discovered on their arrival in Perth that the judicial protocols, which had been observed with respect to the High Court sittings in Perth since 1903, simply could not accommodate a woman Justice of the High Court.

It has been said for many, many years that it is only a matter of time until women are properly represented in the various fields of legal endeavour. Well, how much time?

It is close on 100 years since we have had women lawyers, since the doors have been formally opened. It is 45 years since we have had women lawyers' association in New South Wales; for over 30 years we have had women silks, with Roma Mitchell's appointment in South Australia in 1962 and Joan Rosanove's in Victoria in 1965; we have had anti-discrimination legislation in three States for 20 years¹⁸ and at a national level since 1984.¹⁹ For the past 20 years women have represented in excess of 30 percent of all law graduates and now represent more than half.

Where has this progress got us: we are under-represented at the level of senior partnerships: we are under-represented among the leading advocates, as the Chief Justice acknowledged in his "State of the Judicature" speech: we are under-represented in the judiciary, as was also acknowledged by the Chief Justice.

Let me illustrate the extent of that under-representation at the level of the High Court. In the year 1 July 1996 to 30 June 1997, 73 matters came before the Full Court, with women presenting argument only on two occasions. On the assumption that there were two parties to each of the Full Court matters – an assumption that errs considerably on the side of caution – the percentage of women to total advocates was 1.4 per cent. They were slightly more visible and audible in special leave applications,

with women appearing in the role of advocate on 14 occasions out of 276, giving an overall percentage of 2.5.

I have, I confess, heard many explanations for the under-representation of women in the ranks of leading advocates. I have, for example, been told that women with merit will inevitably be granted silk and get the briefs they deserve. This is a theory I might accept if there were evidence that merit is the universal yard stick to men, or even, for the success of male barristers.

A more recent theory, and one propounded by the New South Wales Bar Association in its dissenting report on Recommendations on Judicial Appointment to the Ministerial Committee on Gender Bias and the Law²⁰ is not that there is discrimination at the Bar, but that women are making decisions early in their careers not to pursue the opportunities available.²¹ In other words, they are deciding not to go to the Bar.

Could it be that the work practices at the Bar are not congenial to women? Could it be that the cost of establishing chambers has a different impact on women who may need to interrupt their careers by reason of motherhood? Could it be that the system of patronage, which, after all, is about maintaining the status quo, is inimical to women? Could it be that the environment men have created is hostile?

Worse, by far, than the under-representation of women is that fact that notwithstanding the progress that has been made by women in the law and notwithstanding the existence of anti-discrimination legislation, the law is no more accessible than it was, say, 30 years ago, no more affordable, no more efficient and barely more responsive to the needs of women and minorities.²²

It is often said that, for a woman to succeed in a traditional male area, she has to be better than her male counterparts. We know this is true. We also know that it is not very hard to be better than the average male.²³ For those reasons, we might have reasonably expected two things. We might have reasonably expected that women lawyers would be better represented than they are; and we might reasonably have expected that male lawyers would have been improved by the competition with the consequential improvement in the availability and quality of legal services.

What went wrong?

In a real sense, what went wrong was that, for all sorts of reasons, women did not really dare to be different from their male colleagues, did not dare to be women lawyers.

To be different, to challenge the codes of conduct derived, as often as not, from rules developed on the playing fields of Eton for the male members of the British aristocracy, would have been to invite ostracism, perhaps, even, the attention of the Ethics committee; to assert that women were different with different needs would have been construed as an acknowledgment of incompetence; to question the bias of the law would have been to invite judgment as to one's fitness to be a member of the profession. And, thus, very many of us became honorary men. We thought that was equality, and, on that account, we rightly deserved the comment of the graffitist who wrote "Women who want equality lack ambition".

In his "State of the Judicature" speech, the Chief Justice acknowledged, as did Sir Anthony Mason four years ago,²⁴ that "[o]ther things being equal, it would strengthen the judiciary to have an increase in the proportion of women judges and judges drawn from minority groups".

I do not treat that statement as directed only to the maintenance of public confidence in the judiciary, although that, in itself, is a matter of great importance. Rather, the statement acknowledges, I think, that justice is done only if irrelevant distinctions are disregarded and, if proper account is taken of the genuinely different needs and circumstances of those who come before the courts. And that is a task that can properly be undertaken only if members of the profession and the judiciary ignore those irrelevancies and are sensitive to those differences. Let me illustrate by reference to a case in which I was involved a little over 25 years ago.

My client was a young Aboriginal mother who had been gaoled for a minor offence and whose daughter had, in consequence, been made a ward of the State. Later, the child was placed in the care of a white Australian couple. On her release from prison, the mother sought to regain custody. On the day on which the matter was listed for hearing, she failed to appear. I obtained an adjournment, although not without difficulty. The solicitor was able to locate her with the help of some Aboriginal contacts and she was brought to chambers.

I asked “why did you not come to court?”. I was devastated by her answer – “I did not want to go to gaol”, an answer that told eloquently of her only experience of the law, namely, of going to court through one door and coming out several months later via prison. It need hardly be said that she did not get her daughter back, partly because her failure to appear at the earlier hearing was taken to indicate a want of genuine concern for the welfare of her child.

The need to reject irrelevant distinctions but, at the same time to take account of genuine differences emerges from an interesting debate to cross purposes between John Stuart Mill and Sir James Fitzjames Stephen QC. In 1869, John Stuart Mill wrote that “the principle that regulates existing social relations between the two sexes...ought to be replaced by the principle of perfect equality, admitting no power or privilege on the one side nor disability on the other”.²⁵ Stephen rejected that view, asserting that a law that treated marriage as a contract between equals “would make women the slaves of their husbands”.²⁶ He pointed out that upon a marriage a man “incurs no doubt, a good deal of expense, but he does not in any degree impair his means of earning a living” whereas “[w]hen a woman marries she practically renounces in all but the rarest case the possibility of undertaking any profession but one”.²⁷

The debate between Mill and Stephen is instructive, if only because Stephen treated equality as meaning “sameness”. But, of course, we are all different, with different talents and virtues, having different circumstances, different ethnic, social and economic backgrounds and different needs. Equality is not blind to those differences; nor is it antipathetic to excellence, individualism or, even, the desire to be different. On the contrary, equality involves the recognition of genuine differences and, where it exists, different treatment adapted to that difference. So much is now established constitutional principle.²⁸ Surely, it is not too much to hope that it will soon be the reality, if for no other reason than the failure to acknowledge and tolerate difference is, in truth, cruel oppression.

I welcome the formation of the Australian Women Lawyers because, it seems to me, that it is an acknowledgment by woman lawyers, albeit, perhaps belatedly, that they are different and an assertion of their right to be so. I welcome it because, it seems to me, to have implicit in it a demand that the legal profession take stock of itself and of those practices which have resulted in the under-representation of women in important areas of legal practice and in the judiciary, not because women should have a larger share of the spoils of legal practice, but because they have the potential to improve the law and the administration of justice.

I mentioned earlier that many of us became honorary men who neither questioned the way in which legal practice was organised nor articulated the possibility of the law’s bias. Today we should also honour and acknowledge the feminist legal academics and legal theorists who have drawn attention to the ways in which the law fails to protect women and fails to respect their equality and, thus, denies them equal justice. In this area, I would like to single out Jocelynne Scutt, Regina Greycar, Jenny Morgan, Margaret Thornton and Mary Jane Mossman.

I believe that having acknowledged and asserted their difference, women lawyers can, with the assistance of feminist legal theorists, question the assumptions in the law and in the administration of the law that work injustice, either because they proceed by reference to differences which do not exist or because they ignore those that do. And having become sensitive to those matters, it will not be long before there is a realisation of the need to be sensitive of the different experiences and circumstances

of others, to articulate those differences when necessary, to question the assumptions of the law as it affects them. In short, to be sensitive to the needs of justice.

ENDNOTES

- ¹ Garner, *The First Stone* (Pan MacMillan, Melbourne, 1995).
- ² See "A Woman Pioneer" (1948) 22 ALJ 1 at 2.
- ³ See Byrne, "Just Dears – Western Australia's first Women Lawyers" (1994) 21(4) *Brief* 13; Thornton, *Dissonance and Distrust: Women on the Legal Profession* (Oxford University Press, Melbourne, 1996), pp57-62. See also *In re Haynes* (1906) 6 WAR 209.
- ⁴ "A Woman Pioneer", op cit n 2, at 2; Bennett (ed), *A History of the New South Wales Bar* (The Law Book Co Ltd, Sydney, 1969).
- ⁵ *The Women's Legal Status Act* 1918 (NSW).
- ⁶ *Female Law Practitioners Act* 1896 (NZ).
- ⁷ *Women's Disabilities Removal Act* 1903 (Vic).
- ⁸ *Legal Practitioners Act* 1904 (Tas).
- ⁹ *Legal Practitioners Act* 1905 (Qld).
- ¹⁰ *Female Law Practitioners Act* 1911 (SA).
- ¹¹ *Women's Legal Status Act* 1923 (WA).
- ¹² Alice May Cummins was admitted under reciprocal arrangements in South Australia, but did not practice in Western Australia. Enid Russell was admitted to undertake articles in 1926 and admitted to practice in 1931.
- ¹³ Although admitted, Ada Evans did not practice at the Bar. She took the view that so much time had elapsed since her graduation that she was incapable of practicing and did not wish "women's standing in the profession to be undermined by a show of incompetence" ("A Woman Pioneer", op cit n 2).
- ¹⁴ *Concerning Solicitors* (Chatto & Windus, London, 1920), p 46.
- ¹⁵ *Concerning Solicitors* (Chatto & Windus, London, 1920), p 47.
- ¹⁶ During the course of this speech, I was informed by Justice Rosemary Balmford that a Victorian women lawyers association, known as the Legal Women's Association, was founded prior to the Second World War and continued to function into the 1950's. See further: Thornton, op cit in 3, p 212.
- ¹⁷ On early women lawyers' reluctance to identify themselves as different by virtue of their sex, and on their silence when faced with their struggles: see Thornton, *ibid* pp 67-70.
- ¹⁸ *Sex Discrimination Act* 1975 (SA) (this Act was repealed and replaced by the *Equal Opportunity Act* 1984 (SA)); *Anti-Discrimination Act* 1977 (NSW); *Equal Opportunity Act* 1977 (Vic) (this Act was repealed and replaced by the *Equal Opportunity Act* 1995 (Vic)). See also the *Equal Opportunity Act* 1984 (WA).
- ¹⁹ *Sex Discrimination Act* 1984 (Cth).
- ²⁰ New South Wales, Department for Women, *Gender Bias and the law: Women Working in the Legal Profession – Report of the Implementation Committee* (1996).
- ²¹ *Ibid*, p30.
- ²² See generally, Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System*, Report No 67 – Interim, 1994; Australian Law Reform Commission, *Equality Before the Law: Justice for women*, Report No 69 – Pt 2, 1994.
- ²³ The view that women have to be better than men but that, fortunately, this is not very difficult was first articulated by Charlotte Whillion, a former mayor of Ottawa.
- ²⁴ "The State of the Judicature" (1994) 68 ALJ 125.
- ²⁵ Mill, *The Subjection of Women* (London, 1869).
- ²⁶ Stephen, *Liberty, Equality and Fraternity* (Holt & Williams, London, 1793), pp214-215.
- ²⁷ Stephen, *ibid*.
- ²⁸ *Cole v Whitfield* (1988) 165 CLR 360; *Bath v Alston holdings Pty Ltd* (1988) 165 CLR 411. See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

LEGISLATING REGULATION OF HUMAN REPRODUCTIVE TECHNOLOGIES

Anne C. Thacker is a barrister who has just published a new book, Women and the Law: Judicial Attitudes as They Impact on Women. In this article, she argues that the current Queensland regulation of human reproductive technologies is inadequate, and recommends new legislative directions for this rapidly expanding area.

It is now clear that infertility is not purely a medical problem that can be dealt with in isolation from the community at large (if it ever was otherwise). The infertile couple and the gamete donor (be it a man or a woman) cannot remain isolated from the social consequences that flow from their actions. The scope of the work available for enthusiastic doctors and scientists with an overwhelming enthusiasm to provide artificial human reproductive services results in a physiological and psychological price to be paid by a large range of people. Inevitably, there will be change to the social fabric of our community and social relationships as we adjust to the various tentacles of human reproductive technologies.

It is of great concern that attention has been focused almost exclusively on particular aspects of these artificial reproductive technologies. Attention is disproportionately focused upon the achievements made by scientists and doctors and celebrations of live births, rather than the difficulties encountered. Certainly, current claims of success still rely on figures showing only successful "pregnancy rates"(sic).¹ The live birth rates are still low per treatment cycle.² This paper seeks to provide a more objective discussion about the conflicting human rights of different parties, and to explore the possibilities for legislating to prioritise between these rights.

The Field to be Regulated

Currently, the technological procedures available include *in vitro* fertilisation (known as "IVF"); artificial insemination by donor sperm; the use of donor ova, sperm and embryos; *in vitro* maturation of ova (known as "IVM"); gamete intrafallopian transfer (known as "GIFT"); pronuclear stage transfer (known as "PROST") and tubal embryo stage transfer (known as "TEST") which both involve fertilised eggs being put directly into the Fallopian tube; foetal monitoring and more recently an array of genetic engineering technologies which are capable of being carried out *in utero*. The possibility for cloning humans is apparently near. As long ago as 1984, Germaine Greer raised issues related to "quality control" of human life in *Sex and Destiny - The Politics of Human Fertility*.³

Current Law

The Australian legislation, mostly formulated in the 1980s and 1990s, fails to address some of the more difficult issues. For example, the experience of oocyte donors is not adequately addressed. The interests of the children born are not well represented. Conflict resolution and complaints processes are not addressed.

Multi-national companies exercise enormous power in this area through their ability to direct finance to the research of their choice. They are able to act with little regard to the impact this technology may have on society. Currently, where legislation has been passed in this field it gives priority to the interests of doctors, scientists and infertile couples.

In Queensland the only legislation to provide any regulation is the legislated prohibition of surrogacy, and amendments made to the *Status of Children Act*. Under sections 15-18 of this Act, the husband of a wife who uses artificial fertilisation procedures is presumed to be the father of the child born, whether the birth was by his semen or not. The semen donor has no parental rights or obligations in relation to any child conceived.

Queensland, has no equivalent legislation to the Victorian *Infertility (Medical Procedures) Act* 1984, the South Australian *Reproductive Technology Act* 1987 or the Western Australian *Human Reproductive Technology Act* 1991. In 1984, a special committee, appointed by the Queensland government to inquire into the laws relating to artificial insemination, IVF and other related matters, resulted in a comprehensive report recommending *inter alia* the establishment of the Queensland Bioethics Advisory Committee to advise government, medical organisations and institutions regarding bioethical issues in the field. This was done. However, it is essentially limited to being an advisory body, and some of the other recommendations have not been followed to date.

There is no avenue for any formal hearing of complaints or objections when an application for a license to carry out reproductive services, research *et cetera* is made. There is no public notification provision that an application for such a license has been made. (Compare, for example, the procedure established in Town Planning legislation where entire divisions of administrative appeals procedures allow for the hearing of objections to planning decisions of Local Councils as to land use.). At present a patient's complaint of recklessly careless behaviour by a doctor may not be sufficient to satisfy the Minister of Health that the doctor's and/or the hospital's license to practice should be suspended or cancelled. By not confronting these difficulties the legislators appear to condone their continuation. Is a Minister of the government a person necessarily qualified to make decisions on these sorts of difficulties anyway?

Would it not be more useful for the community to have the rule of law available to clarify issues or at least provide some benchmark of acceptable interplay between the rights and interests causing conflict in the community? There is no doubt the judicial arm of government could be equipped to arbitrate such conflicts. In the first instance, however, it is necessary to categorise the different and/or conflicting interest groups and identify their overlapping and/or conflicting interests, to inform the content of such laws:

Rights and Interests to be Addressed

The Women Participants Whose Bodies are Being Affected

This group includes a number of women who cannot speak out or perhaps even identify the negative implications of their involvement with infertility issues because of the hopes and fears they carry. In some women a high level of anxiety can be generated. That burden should not be theirs. There is a wealth of material that may now be drawn upon to inform us of the ways in which technology has not always been used in the interests of women and children. It should incite us to consider how women must be vigilant in protecting their lives and their role in society.⁴

The Gamete Donor

The interests of women who donate eggs (the oocyte donors) for artificial insemination need to be given greater priority. The procedure through which their eggs are collected involves surgery under general anaesthetic, which may hold life-threatening risks. This contrasts sharply with the procedure for sperm donation.

There are a number of areas of likely contention relevant to gamete donors. Firstly the oocyte donor may not see herself as having any real choice about the proposal. She may hold fears for the future for which she wants to take some active responsibility.

Secondly, the gamete donor may donate her egg (a procedure called "IVF surrogacy")⁵ and then not wish to allow the birth mother to proceed as promised. If this dispute is characterised in terms of contract law, the gamete donor will be held to her promise. The much publicised "Baby M case" in America⁶ highlighted the inadequacy of applying the law of contract to this sort of dispute. Having provided a gamete and having carried the pregnancy to full term, the woman gave birth to Baby M. She then refused to give up Baby M and at that point made a legal claim for Baby M, against the man who had provided his sperm pursuant to the surrogacy contract. In the subsequent court hearing, baby-making was viewed as no different from any other contractual obligation. The contract was upheld. Such a holding conflicts with section 64(1) *Family Law Act (Cth)* which makes it mandatory in disputes which come before the Family Court, for the Court to regard the best welfare of the child as the paramount consideration in all matters relating to children.⁷ The current prohibition on surrogacy in Australia appears unlikely to continue as a blanket prohibition.⁸

Thirdly, there are the situations where the gamete donor is a male who has simply donated to a sperm bank, or otherwise donated, and does not envisage (or want) any further connection with any child born. Should any obligations flow, so far as the child or other members of the associated families are concerned?

More complicated still, dilemmas arise regarding any "spare" or "excess" embryos left after the procedures are finished. What if such an embryo was used either without the owner's knowledge or with the owner's knowledge but beyond the consent given? Currently, there is no legally binding answer.

The Child Born

The child born has needs separate from the surrounding adults. For example, the need to belong to their own family of genetic origin and the security of continuing to belong even if the adults in their genetic and/or social family separate and the family unit/s break/s down. Further, knowing their genetic identity, tells them with whom they may (and may not) mate in adult life.

Currently, the Commonwealth *Family Law Act* makes provision in section 60H for children born as a result of artificial conception procedures. If a child is born to a woman from such a procedure and the procedure was legally carried out "with their consent" (sic)⁹ then, whether or not the child is genetically a child of the woman and her male partner that child is their child for the purposes of the *Family Law Act*. Thus the general prohibition on surrogacy arrangements is supported. Conspicuous by its absence is the ability of the Family Court to make orders which recognise multiple parentage and associated rights and obligations that could flow from same, from the point of view of the child.

The availability of services such as ova banks (similar to sperm banks), use of eggs from aborted fetuses and procedures arising from ability to clone cells, will mean that there will soon be children born who are totally outside all our current understandings of social connection. What happens if a child is born without anyone willing to be the social parents?

Concerns should be raised that damaged people may result from such beginnings. As our witness to such possibility we have the adoption experience (being the legally sanctioned social, psychological process by which a child is given a new family relationship to the exclusion of the child's original family) and more recently, the public outcry recognising the damage to the "stolen children" and their families in the Aboriginal and Torres Strait Islander's community.¹⁰ Less well known about are the "stolen children" taken from their families in England during World War II and brought to Australia as "orphans".¹¹

Excluding the recognition of a person's origins, and thus supporting the nuclear family unit as the only legitimate form of family, has proved wholly unsuccessful for many people. Principally this includes many adopted children (and relinquishing mothers) traumatised by loss of identity, as well as the shame that the secrecy of the procedure engenders. Changes to adoption (making it a measure of last resort), public acknowledgement of the damage to "stolen children" and use of the *Family Law Act* procedures, openly recognizes the whole social circle including the biological parents and child, as well as the social parents and family and identifying information about all parties involved with the child.¹² The same should now be made possible for the children born of human reproductive technologies.

The Family who will Raise the Child

Aspects of concern covered (above) with respect to the child born are repeated here: The child will be biologically related to some people and socially related to others. The question of how people's rights to family connection are to be accommodated becomes vital given our experiences of the people damaged by adoption and the "stolen children" experiences.

Of course, where a person does become a member of any special group, like a family, a valid and tangible connection is established which is vulnerable to disruption and damage, especially when it has endured for many years. Special consideration must be afforded to these families when access to the child's identifying information is arranged.¹³

Social parents who seek to deny the origins of their child, and even some who remain open, will encounter difficulties when the child, as an adult seeks and/or gains access to identity information. This is a matter conspicuous by its absence in the writing and reporting of the Kirkham sisters' surrogacy arrangement (before such arrangements were banned), in relation to who is the father of the child.¹⁴

The Social Parents of the Child Born

At the centre of the debate is the question of whether the desire for a child is a human need or something less, like a wish, however fervently held.¹⁵ Infertility and the desire for motherhood must be understood in the context of the role motherhood plays in identity and self esteem in Western communities. Robyn Rowland, in 1987, explained:

For women, motherhood is deemed to be the true fulfillment of femininity. For many women, internationally, it brings little power in real terms, but for many, it is the only power base from which they can negotiate the terms of their existence. Women learn to like themselves in the motherhood role because it allows them experiences of love and power not easily found in other situations.¹⁶

Further, the ideology of Western communities, supports the 'necessity' for a woman to express her love for her man by presenting him with 'his' child. It is in this context that women "choose" motherhood and that motherhood is perceived as the ultimate goal. While there are a variety of differing views on the frequency of infertility in the world population, the fact remains that the incidence of infertility does not threaten the continuation of the human species.¹⁷

"Social parents", like "the infertile couple" are dangerous concepts as they perpetuate the myth that couples are always of one mind about matters that affect their lives. The true situation within a couple can be masked by the pressures brought to bear in a society that demands cohesive presentation by "the normal couple" as a neat nuclear family unit of mother, father and children. Although in our society infertility is often seen as a woman's problem, in as many as 30% of infertile couples, it may be the man who has the infertility problem¹⁸. Yet it is often the woman who pays the physiological/psychological price for "their" infertility.

The growing acceptance of the use of artificial reproductive technologies as the proper response to the problem of the infertile couple limits opportunities for understanding other ways of dealing with infertility. This is reinforced for some, by the current trend towards vesting authority for consent to medical procedures undertaken on women with "the infertile couple".¹⁹

This is not to say that there are no situations where an infertile couple may be assisted. Such an attitude would deny the benefits of the medical advancements made, to which all in the community should have access. However, it does mean that the current presentation of reproductive technology as both a "fix" which reinforces society's view of women as mothers and pressures women to bear children, and as a mechanism by which a couple may "own" a baby, should be reassessed.

Consideration of the potentially conflicting interests involved, should be included in the preparations of each of the parties proposing to engage in the treatment program. Currently, there is no imperative for this to occur. Certainly there is little funding to support any opportunity for this to occur. The law might also address the underlying cultural values that inform the desire for a child by making independent information counselling compulsory for prospective social parents. Legislating for mandatory information counselling and mandatory contents of such counselling could address these matters (especially if government funding were also made available in the same proportion as funding of the infertility related procedures).

The Doctors and Scientists

From public discussions and the various reports made in the information media, one might be excused for focussing on the scientists, doctors and the "greater cause" itself, to the exclusion and detriment of the women and children directly involved.

As already noted legislative intervention to date has focussed upon the restrictions to the work of doctors and scientists so that the worst excesses imaginable may be thwarted while, at the same time, work continues towards the development of artificial means of baby-making and/or production of humans.

It is no longer seriously considered an option (if it ever was) that there be a total ban on experimentation. However, this does not stop questioning about aspects of experimentation when it conflicts with what we hold sacred. Do we want doctors and scientists engaging in human creation and thereby interfering with the established patterns of human relationships and the integrity of humankind as we currently know our existence to be. Do we want only "perfect humans" (whatever that phrase means) to populate the planet?

The Wider Community

There are many questions being asked by the wider community of interests. The questions include:

- Can our commitment to human rights also accommodate the denial of human rights intrinsic to allowing some infertility treatments?
- As emphasis on infertile individuals and couples with an unmet desire to have a child, denies the change to the collective process of reproduction for all people (especially women as a social group), how does the community determine which fertility treatments should be financially supported (for example by Medicare)?
- Mention has already been made of the power of multi-national companies that have entered the field with their own seemingly immutable agendas. Can we justify the large amounts of money reproductive technologies require to operate, carry out experiments and conduct research?

To date, the regulation of the field has been left, substantially, in the hands of those who know most about it - doctors and scientists, who have their own biases and self-interests to promote.

The religious institutions, once leaders on questions of morals and ethics have lost their way and become largely irrelevant to the mainstream public. The Christian churches largely insist on maintaining a status quo of paternal authority which is, increasingly, out of step with reality.

We are left looking to our governments to engage in the weighing of the different interests and the protection of compromise arrangements. The rule of law is the legitimate authority for enforcement of rules in our society.

The Future

The legislators must be moved to assist us. Initially laws may be passed to compel such preparatory steps as information counselling, mediation and arbitration of conflicting human rights and interests, and consensus processes between participants and interested parties in the field. This should occur before any experimentation and/or treatment procedures are embarked upon. Where conflicts cannot be resolved otherwise, the rule of law provides certainty of outcome, instruction for the future and avoidance of the worst excesses of arbitrary dealing.

With respect to the call for legislative regulation of the field, The Queensland Women's Interest Coalition has most recently suggested strategies for action, commencing with the call for laws to commence from the principle that women have the right to quality reproductive health services.²⁰

The Queensland Women's Legal Service produced a draft submission on reproductive technologies which calls for controls and guidelines on all practices of reproductive technology.²¹ It is not within the scope of this article to provide detailed specifications of them. However, in my opinion, the basic components of such legislation should include the following matters:

- Development of standards to regulate programs providing reproductive technology services to women to ensure the health and well-being of women and children.²²
- Ensure that all existing programs adhere to guidelines which state that women should be given adequate information about any medical treatment or procedure and be provided with information counselling in order to ensure their informed consent.²³
- Information counselling should be made compulsory before undergoing any procedure.²⁴
- Such counselling should also be stipulated to be independent. Counselling facilities for participants in relevant fertility programs have already been set up in most states, including Queensland. In Queensland, while counselling is made available at the clinics providing the infertility treatment, there is no mechanism to ensure that independent information counselling is provided. In Queensland, it appears there is no certainty that a gamete donor would be provided with satisfactory counselling. The only material I found available referred to counselling for the infertile couple intending to undergo treatment.²⁵ Ideally, independent counselling is intended to equip participants with the information and understanding that will enable them to make informed choices about whether or not they wish to consent to the medical procedures proposed.

- A supervisory body, such as the Queensland Bioethics Advisory Committee should be empowered to regulate and supervise the people and institutions (including hospitals and scientific centres) carrying out research, experimentation, fertilisation and other procedures, and activities that seek to further the area of artificial reproductive technologies. Such supervision should be coupled with an obligation to account publicly for these activities and to report to a suitable policing body with the authority to deal with any breaches of the law.
- A suitable legal structure, preferably within the court system, must be established to hear and determine any of the complaints and conflicts of interests of persons affected by the use of artificial reproductive technologies.²⁶ This would include, for example, an avenue for parties to register their interest in artificial reproductive technological procedures affecting them, directly or indirectly. Any conflict arising between these interested parties would be resolved through a mechanism that utilises the (now) standard conflict resolution strategies of dispute resolution (including mediation and arbitration). This would be in addition to a more formal avenue available through either the court system or similar system, for disputes which are not otherwise resolved, and/or require a public forum for resolution of associated principles, precedents and important issues.
- Stipulation of activities offensive to, or in breach of, the law, such as unacceptable and prohibited research or experimentation practices, medical procedures, and/or creation of children who will have no social parents/family. Appropriate injunctive avenues and penalties devised for breach or anticipated breach of the law would be included and coupled with a suitable policing authority.
- Compulsory record keeping by hospitals and the Department of Health, as appropriate, as well as extension of the Registry of Births Deaths and Marriages so that all citizens have equal access to information about themselves.
- Regulation of use and/or disposal of embryos, gametes, and embryos stored in frozen banks for use in the future, and embryos created but "belonging" to person/s unknown.

Conclusion

The common law and current legislation is not equipped to deal with resolution of the conflicts created by the developments within human reproductive technologies.

This paper is informed principally by those voices which are often given limited opportunity to be heard, or dismissed as obstructionist to "greater" interests. It is intended that each issue raised in this paper be used as a vehicle to continue discussions and debate. The issues form the basis of the more obvious considerations to be taken into account when devising a legal response to the demonstrated need for regulation of the field of human reproductive technologies.

ENDNOTES

¹The current Queensland Fertility Group brochure states:

The less invasive procedures...have a pregnancy rate of around 12% per treatment cycle.
Pregnancy rates for the higher technology treatments....range from 20% to 50% per treatment cycle.

² The National Health and Medical Research Council's (NHMRC) "Draft guidelines on assisted reproductive technology" (1996), under the section Informed decision-making states:

Information giving: the obligation of the duty to care, which encompasses also the duty to warn, has important implications for information giving. Information given should include relevant success rates...

In the same footnote it is stated:

There has been very little change in the success rates of IVF and GIFT treatments over the past few years. In 1992-93 between 20-22% of IVF treatment cycles resulted in pregnancies, 72 - 74% of those pregnancies resulted in live births...GIFT treatment had a success rate of around 24% in 1992 - 93.

³ Picador Press, chapter 10.

⁴ Scutt, J., *Women and the Law*, Law Book Company, Sydney, 1990, p.187. See, O'Brien, M., *The Politics of Re Production*, Routledge & Kegan Paul, 1981; Rowland, R., *Living Laboratories - Women and Reproductive Technologies*, Sun Australia, 1992; Scutt, J., *The Baby Machine - Commercialisation of Motherhood*, McCulloch Publishing, 1988; Klein, R., (ed.) *Infertility*, Pandora Press, 1989; Graycar, R., and Morgan, J., *The Hidden Gender of Law*, Federation Press, 1990, Part 3.

⁵ See the "Baby M Case" story re-told by Chesler, P., *Sacred Bond*, Virago Press, 1988.

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- ⁶ Notice: "Surrogacy" is a confusing word: The "surrogate mother" in the Baby M case was both the genetic and biological mother of Baby M.
- ⁷ See for example the case of *S v. Q*, Family Court decision made 29/7/98 and reported "Court Orders baby's return to surrogate" in *The Courier Mail*, 30/7/98, p.1. The "surrogate mother" handed over the child born to the "natural father" and his wife, a few weeks after the birth. However, after that, the "surrogate mother reneged on the deal and took (legal) action to gain custody". The case may yet be appealed to the High Court of Australia for a final determination.
- ⁸ Surrogacy is regulated by law in five Australian States, in all of which any surrogacy contract is illegal and unenforceable. In four States, including Queensland, IVF surrogacy is prohibited. In ACT it may be allowed in the absence of commercial arrangements.
- ⁹ See section 60H(5) which provides that a person is presumed to have consented unless it is proved, on the balance of probabilities that the person did not consent.
- ¹⁰ See the National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families from approximately when British occupation of Australia began in 1788 through the "protection years" commencing with the establishment of Boards for the Protection of Aborigines in Victoria (1860s) and NSW (1880s) and Qld (1897) which protected the system of removing Aboriginal children from their families and placing them in "white - run" institutions. Such systematic removal of children was not stopped until during the 1970 - 80s
- ¹¹ See "British damn 'depraved' Australian Orphanage" in *The Courier Mail*, 31/7/98, p.1. The article includes an admission that the "stolen children" children had been deceived and their poverty-stricken parents were told their children had been adopted by "middle-class" Catholic families in England when they were actually shipped to Australia.
- ¹² See section 60G *Family Law Act* which provides for adoption to proceed only after leave of the Family Court is granted. In considering whether leave will be granted the court must consider whether such grant would be in the child's best interests.
- ¹³ Hale, J., "Support for Adoptive Parents", in Swain, P. and Swain S.,(eds.),*To Search for Self: The Experiences of Access to Adoption Information* (Federation Press, 1992), Chapter 10.
- ¹⁴ *The Age*, 8/7/93, p. 2 and 12/7/93, p. 17 and Bone, P., "The Ties that Bind Mothers and Babies", *The Age*, 23/8/93.
- ¹⁵ The debate was embraced some time ago, see Klein R., *The Exploitation of a Desire: Women's Experiences with IVF*, Deakin University Press, Geelong, 1989.
- ¹⁶ "Choice, control and issues of informed consent: The new reproduction and birth control technologies", *Symposia 1986: Informed consent*, Law Reform Commission, Melbourne, 1987.
- ¹⁷ Scutt, J., *Women and the Law*, Law Book Company, Sydney, 1990, p.187.
- ¹⁸ Ewing, C., "IVF, artificial insemination and ethical implications of reproductive technologies". Paper available from the Victorian Council of Civil Liberties.
- ¹⁹ See Munro, K., "Women's Reproductive Rights and Australian Law", *Australian Women's Research Centre Newsletter*. See also the Queensland Fertility Group's brochure, which is addressed to "the infertile couple" where independent and separate advice and counselling might be more appropriate.
- ²⁰ Liddy, U., and Rowell, R., (eds.) *Current Issues of Concern to Women in Queensland*, Queensland Women's Interests Coalition, Position Paper Number one - March 1998, p. 4.
- ²¹ Available from the Queensland Women's Legal Service.
- ²² *ibid*.
- ²³ *ibid*. Separately, provision should also be made to inform male partners and other male participants and interested males.
- ²⁴ *ibid*.
- ²⁵ The Queensland Infertility Group's current brochure.
- ²⁶ See for example, availability of accessible, low-cost, quick, dispute resolution service through a non-adversarial process of mediation set up pursuant to the *Dispute Resolution Centres Act, 1990 (Qld)*. See also the suggested details for content of legislation in the Queensland Report of the Special Committee appointed by the Queensland Government to inquire into the laws relating to artificial insemination, IVF and other related matters: Vol.1, 1/3/84. (This is still current, given no legislation substantially on point has been passed, in Queensland). See also The National Health and Medical Research Council's "Draft guidelines on assisted reproductive technology" (1996).

INSTITUTIONALISED WOMEN - WOMEN PRISONERS

Eileen Baldry is a Lecturer in the School of Social Work at the University of New South Wales. In this article she investigates the reasons for the increase in the number of women in prison, and recommends alternatives to institutionalising women in prison.

Introduction

Prisons are the ultimate institutionalised form of sanction in our society. They remove freedom and they punish. They are highly coercive, constructed environments, which reshape the behaviours and self-images of both prisoners and staff. They veer to discriminatory, corrupt and unjust practices by their very nature: closed secure institutions with massive power differentials. They tend to create and maintain cultures which favour discrimination against minorities, personal circles of power and influence and bullying.

As David Garland (1990), one of the world's pre-eminent thinkers and writers on prisons says :

The penal system's very existence helps us to forget that other answers to these problems (of anti-social behaviour) are possible: that institutions are based on convention rather than nature" and "that we have not thought deeply enough about punishment. (p.4)

Whereas women form a large proportion of some institutionalised populations (for example psychiatric institutions), they form a tiny proportion of the prisoner population - some 336 out of a total of 6,443 full-time prisoners or 5% in NSW (Corben 1997), ranging between 2.5% to 6.5% in some other states and countries (Stern 1998:136-153). That is a large increase from just ten years ago when women formed only around 2-3% of prisoners in NSW (Walker 1993:20). The rate of women in prison per 100,000 of the population has also increased. In 1984 the rate was 9.4 but had risen to 17.4 by 1992 (Hampton 1993:2; Walker 1993:20). The rate for Aboriginal women is approximately 250 per 100,000. This situation is not unique to NSW of course, nor to women. Most 'Western' countries have experienced rises in prison populations. The current NSW Government makes the point that the number of women in prison has been fairly stable over the last five years or so.

While this may be true, it ducks the issue. The 1992 figure, at which it has remained stable, is higher than all other Australian States (Walker 1993:20), especially Victoria, which is the most comparable State, at 6.6 per 100,000 of the population. There has also been an increase in the number and proportion of women remandees: women who are being held awaiting trial who have not been found guilty of a crime. There are some 70 women remandees- 20% of the women's prison population. On top of that there are some 30 on appeal or 9%. Thus, in effect close to 30% of the population of women in NSW prisons is either on remand or appeal (Corrective Services NSW, 21.6.98). The male rate is 15% on remand and 6% on appeal.

To greater and lesser extents, modern societies have struggled with the problem of what to do with people who do anti-social things. However, the definition of anti-social has changed. What has not changed substantially is that a majority of people incarcerated are poorer and less well educated than the average person in our society. They have poorer social skills, they are likely to have been abused as children or young adults and they or their parents may well have come from an institutionalised setting. Women prisoners have traditionally been infantilised, abused, over-medicated and separated from any children (between 50 and 60% of women in NSW prisons have dependent children). Although some regimes are now trying to address these matters, the majority of women in prison are still confronted with these issues.

On what basis are women imprisoned?

Thinking about the prison involves thinking about the law, juvenile justice, the police, the courts, and social policy. Clearly this represents a much larger brief than we have space for however these areas will be addressed briefly. One of the reasons for an increase of women in prison today is the fact that, in NSW and some other states, people are put away not only for drug dealing but also for possession. Around 15% of women are in NSW gaols for drug offences, with another 26% for various stealing offences, many of which are drug related. Fraud accounts for 15% (Corben 1997), and is often related to poverty. These figures alone mean that over 50% of women in prison are in on drug and largely poverty-related offences. In a recent report on women in prison and drug use 72% reported a relationship between their drug use and current imprisonment and 62% reported being under the influence of a drug (including alcohol) at the time of arrest (Kevin 1995:15).

There is growing evidence (Denton:1994:37-38; Alder 1994:143) that a higher proportion of women in prison than in the general community have been subjected to violence of varying forms - child abuse, child sexual assault, domestic violence and rape. Such women become drug-addicted far more commonly than others in the community. Thus, it is impossible to avoid questioning the use of prison for such cases. As Alder points out, these women may owe reparation for their acts, but reparation may also be owed them (1994:144).

In addition, it must not be forgotten that many adolescent girls are often introduced to the criminal world after abuse of some form and/or the breakdown of wardships drive them onto the streets and into the world of prostitution and drugs (NSW Ombudsman 1996). Institutionalising such girls in detention is often a precursor to adult prison.

Every report written on imprisonment recommends changes in legislation to reduce the numbers of such women being incarcerated. Drug law reform is crucial to redirecting women with an addiction and/or involvement in drugs to appropriate services. It has been argued convincingly for years that certain crimes, such as possession of drugs for personal use, should be decriminalised (Ryan 1983:124-141; Report of the NSW Task Force on Women in Prison 1985: Rec 52 p247). This should be in addition to the removal of prison sentences for some minor property crimes and offences against good order.

As Murphy and Dison (1990:8) put it:

“...prisons were never intended to correct every social ill....[but] somehow the fear of incarceration is supposed to outweigh the effects of long-term unemployment, reduced educational opportunities, social dislocation, and the despair that accompanies a lack of upward mobility.”

Here the number of Aboriginal girls and women in custody must be addressed. There is a massive overrepresentation of Aboriginal girls and women in Australian prisons. In NSW juvenile detention centres, Aboriginal girls are sometimes as much as 50% of the detention population (although that varies enormously because the number of girls in detention is usually fairly small). Whilst in prisons, Aboriginal women form between 18% to 22% of the women's prison population, they form only around 1.8% of the population of women in NSW. This is close to the worst over-representation rate in the world. It is far higher than the Aboriginal male rate which is around 14%. Many of the Aboriginal women were removed as children, or are children of removed children, and they in turn may well have had their children removed (Standing Committee on Social Issues 1997:42-43). Institutionalisation in a variety of guises is a way of life for many of these Indigenous women.

What has Led to the Increase in the Number of Women in NSW Prisons?

There are a number of possible reasons often given. Firstly the effect of the 1989 Sentencing Act NSW (or Truth in Sentencing as it is popularly known) has been to increase sentences overall and therefore increase the number in prison at any one time. Again, this is common to many countries where prison sentences have been lengthened due to a perceived rise in crime and the resulting public demand for harsher penalties (Junger-Tas 1994: Ch1). Secondly, more women are committing crimes, particularly theft and other 'economic' crimes in relation to drug addictions and poverty. Thirdly, police are catching more criminals in general, including women, under the get-tough policies of recent and current governments.

Do any of these factors justify the increase of women in prison? The sentence lengthening effect of the 1989 Sentencing Act was condemned by most in the justice field as counter-productive. Nevertheless, it cannot be the main reason for the increase. Well before the 1989 Sentencing Act, there was a strong rise from 1982 onwards. Consequently, although by 1992 there had been 160% increase in numbers of women in prison (NSW Corrective Services 1994:12), a good proportion of that increase had taken place before 1989. Cunneen (1992:14) also points out that, although there have been increases in reported offences across Australia, they have not resulted in comparable rises in imprisonment rates between the states and territories. Some of the increases in terms of convictions of women, lie in offences attracting short sentences. In 1994, 61% of women committed to prison in that year had sentences of less than six months (Edwards 1995:1). As Vinson (1995:79) points out, in 1994, Aboriginal women accounted for 25% of the female prisoners in NSW serving aggregate sentences of three to six months. He also argues convincingly that most short sentences should be replaced with community based sanctions as happens in some European jurisdictions. In Austria, for example, prison has been eliminated as the sanction for all who would have been given a sentence of less than 6 months (Junger-Tas 1994:7-10). Staff at Mulawa told the NSW Parliamentary Social Issues Committee (1997:35) that of the 200 women there at the time, only 15 needed to be in gaol for their own and the community's safety.

What is the nature of this institutionalisation?

*Everybody's buttoned up quick today.
The boss shouts
and clocks plates books and words
fracture...
thin cries rise and fall
carefully crouching in corners.*

*Shivering amongst the pigeons
I conjure piazzas
depending on the season possibly Florence....
or shiny through paling fences
on drowsy afternoons dipped in passionfruit
the sea salt-air and evening southerlies.*

*Strip to survive
Carry water and wishbones.*

(From: *Water and Wishbones* (1995) Limited Edition. Poetry by Margaret Maude Lamont reprinted with permission from the author.)

Women prisoners learn to survive in a fairly brutal, dehumanising frightening world that is beyond comprehension for those who have not been subjected to its regime. As always when there is a large power differential, the staff have an enormous amount of coercive power over inmates, especially women. It is not unknown for women to be threatened with cuts to visits from family and children if

they do not obey the staff's instructions. In the current system there is no permanent independent surveillance of how staff treat women in prison, nor of how women prisoners treat fellow inmates. There are standover women who demand favours from younger, more vulnerable women and back up their threats with violence and abuse. There are those who deal drugs in prison. There have been cases of staff and inmates coercing others into sexual favours. Some women have been kept in isolation when drug affected and some very serious health problems have been utterly ignored by dismissive guards and even health staff (NSW Ombudsman 1997).

In fact, health care has always been the source of much discontent and distress. The Mulawa Report by the NSW Ombudsman (1997) had major negative findings regarding the attitudes and standard of health care by Corrections Health. Australian prisoners are not cared for under Medicare. This, I believe, is a serious wrong because the Corrections Health Service is more likely to veer towards a custodial model of treating inmates than an outside service funded under Medicare (NSW Prison Medical Service Review Committee 1991). To get through the humiliations and damage to self-esteem many women use prescription drugs from the health service to blank out some of the trauma. Many of them have never been properly counselled regarding the sexual and physical abuse they may have suffered and many would not see gaol as a suitable place to deal with those matters even if there were well-qualified staff (Hampton 1993). This is particularly the case for Koori women. Self-harm is common in women's prisons, often coming in waves to draw attention to unacceptable conditions or harsh behaviour by other inmates or staff (Heney 1990; NSW Ombudsman 1997).

*I can't stand people
who have never been in prison
telling me
I'm better off than them.*

*Let's talk about razors
and blood as a way of letting off steam.
about daily dreams of death.*

*Or let's agree not to speak lightly
of that which we do not know.*

Let's agree not to speak.

From: *Water and Wishbones* (1995) Limited Edition. Poetry by Margaret Maude Lamont reprinted with permission from the author.

Women in the major gaols are subjected to fairly strict regimes of rising, eating, sleeping, and working (if available), but that does not relieve the unmitigating unnaturalness. It is almost impossible to engender a sense of independence and adult behaviour in a regime which removes almost all choices and independent living (Hampton 1993; Hannah-Moffat 1995). This is not true of the NSW Transitional Centre (and similar centres in other states) nor, to some degree of the Jacaranda Cottages at Emu Plains (for women and children), but these hold a very small proportion of women in prison; it is the case with almost all other prison regimes here and around the world.

Classification

The NSW prisons' women's classification used to be the same as the men's: maximum, medium minimum - entirely inappropriate. Classification in NSW is undergoing change to become more risk and needs based, which should be better. But still, most women are held in prisons designed for the old style of classification. There are 2 major women's prisons - Mulawa (at Silverwater) and Emu Plains. Although there are almost no women who need to be kept in a maximum security prison, the whole of Mulawa is very similar to maximum prison. The secure prison at Emu Plains although it is

minimum, is still highly regimented and secure. There are two small exceptions to this style of imprisonment. The Jacaranda Cottages at Emu Plains represent a much better model with places for children to stay, normal types of rooms and facilities. The Transitional Centre in which there are around 14 women, is a program to help women who have been in prison for some time to make the transition back to the community.

Blanche Hampton (1993:6) says

Both women and men in prisons are subject to dehumanising processes which appear to have a diminished sense of self as their end goal. Women's prison experience is different from men's ... and women's imprisonment is even more stressful and traumatic than it is for males.

For those women who are sole carers of their children their stress and anxiety extend beyond the prison. The Children of Imprisoned Parents (Standing Committee on Social Issues 1997) makes the point that, of the 60% of women in prison with children some 40% are sole parents. The custody arrangements for those children are often less than satisfactory, with many children ending up as state wards and/or in juvenile detention themselves.

Perhaps the most sobering thing is that only about 10-20% of reported (and many are not reported) robberies, thefts, break & enter and other property crimes and about 50-60% of major assaults, are cleared (Bureau of Crime Statistics NSW 1997) meaning that most people who commit crimes are not incarcerated anyway. So what we are doing by putting people in prison is fairly tokenistic, does not reduce crime, certainly does not deter people from committing crimes and is negligible in its reform effects.

It seems almost inescapable from the data quoted earlier that crime (how it is defined, policed and punished) and imprisonment (who goes to prison) have "important class related features" (Zdenkowski & Brown 1982:49) as well as racial and cultural features which are related to class but also separate from it. Women suffer just as men do from these discriminations.

After prison

What is the result of this institutionalisation? Even for those on short sentences, relationships with children have been severely disrupted. Drug addiction continues and most of all, poverty continues for a majority (Report of the NSW Task Force on Women in Prison 1985; Hampton 1993; Sherrin 1995). Very few may have gained a skill which provides them with work opportunities. For example, one of the larger plant nurseries had a scheme by which women learned to grow seedlings whilst inside and some were employed by that company when they were released; however, this is rare. There is no employment service specifically for women ex-prisoners in NSW, or anywhere in Australia. Many find it extremely difficult approaching a service or an employer where they may have to declare that they have been in prison to people with little understanding.

There are very few counsellors or therapists who are skilled in working with women who have been inside. Knowledge of how to help women deal with the effects of prison institutionalisation is in very short supply. Many women tell post-release workers with organisations like CRC Justice Support and Guthrie House that they are so relieved to receive counselling and support from people to whom they don't have to explain themselves. Many of them go through a number of counsellors or therapists whom the women have to educate about what it means to have been incarcerated. Post traumatic stress, lack of esteem, lack of independent living skills, lack of relationship skills, fear that everybody you pass on the street can immediately see you are an ex-prisoner, inability to organise your day - these are common post-institutionalisation experiences for women after release.

Most women have a difficult time finding accommodation because their time in prison has stripped them of whatever housing they had. Those who have children cannot regain custody of their children until they have obtained accommodation. They may well be on methadone and there are very few

accommodation services providing for women on methadone with children. Then there is the problem of re-establishing relationships with family members many of whom greatly resent the impositions they have suffered whilst the woman has been inside - the expense, the shame, the extra care of other family members, the emotional stress. Then there are those who are going back to an abusive relationship which they have not learnt to deal with whilst in prison. So for many it is a revolving door - back to prison in a few weeks or months (Report of the NSW Task Force on Women in Prison 1985; Hampton 1993; Baldry 1997; Standing Committee on Social Issues 1997).

Other Approaches

There are alternatives to institutionalising so many women in prison. As Paterson, a British Police Commissioner said, "It is impossible to train people for freedom in conditions of captivity." (Stern 1998:308) Prison as an institution does not promote healing because it does not promote personal recognition of what has been done to another; nor does it promote healing of the victims. It is a school for crime and generally fosters anger or despair.

It is vital to promote ways of restoring what has been lost or damaged and reintegrating girls and women who behave in destructive ways. It is necessary to recognise that many of them are victims, as well as offenders. Many people have very difficult lives but do not steal or commit fraud. So is there a way to help? Restorative Justice is one model being tried in some communities. This involves the offender, her family or supporters meeting with the victim and his or her supporters in a group conference to work out what restitution can be made by the offender and how the offender can deal with the causes of her criminal behaviour (Stern 1998:326-331). This is not usually by a prison sentence. This approach is being used in New Zealand for youth and now in NSW with Youth Justice Conferencing being run around the state.

What are some of the things we should be arguing for to promote a fairer outcome for all women who may be at risk of getting caught up in the criminal justice system?

We should:

- ensure we maintain and improve social programs to reduce sexual and physical abuse of girls and women, improve community cohesion and reverse the trend towards inequality;
- eliminate poverty traps currently embedded in the tax and social security systems;
- promote law reform to make certain offences such as possession/use of drugs, minor fraud, or minor theft, to either not offences, or to non-prison offences and eliminate prison sentences of 6 months or less, providing community options instead;
- support culturally integrated and culturally appropriate healing and counselling workers, and centres for women who have had histories of abuse and crime;
- divert money from prisons to specialised residential drug rehabilitation centres for Aboriginal women, women with children, women with a history of abuse and others with an addiction.(It costs around \$50,000 to keep someone in gaol for a year);
- provide bail hostels for those too poor to provide bail or those without a permanent address; and
- promote restorative justice approaches where appropriate.

Let us never deceive ourselves. Society is not better because these women are in prison. They are not, on the whole, better off when they come out. Crime is not reduced by their being in prison and when they come out they are likely to re-offend. Victims of their crimes are not recompensed or restored by their being in prison. Revenge may be served to some degree but that is a poor outcome for such a drastic social and economic outlay. Imprisoning women as we do in the State of NSW is largely a symbolic, classist and racist act by the dominant social class in that it puts away poorer, less well educated women and Aboriginal women. Scapegoating based on class and position in society is as old as human communities.

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STALKING

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Introduction

The Oxford Dictionary's definition of stalking is '... to pursue prey/game stealthily.' In reality, stalking is much more. Stalking is about a person feeling helpless while someone else has power and control over their life. It is intrinsically linked with violence, potential or existing, real or threatened. Stalking is not a new phenomenon. History shows that stalking behaviours have occurred throughout previous centuries and is usually associated with domestic violence. Stalking victims may have different stories to tell but they all have one thing in common - fear.

Dr Robert Simon, a Professor of Psychiatry at Georgetown University in Washington DC, states that stalking '...is rooted in the ancient concept that women are chattels or property. By wielding power over a woman, the stalker is asserting that he will be part of her life whether she likes it or not'. (1996:50)

The Stalker

Although it is acknowledged that men can also be the victims of stalkers, the vast majority of victims are women. Men stalk when their relationship breaks down or they become obsessed with their victim who is often known to them.

Stalkers can engage in anything from phone harassment, vandalism, sending letters, gifts, blood or faeces through the mail, to a myriad of obsessive behaviours in their pursuit of another person. Stalkers rarely give up on their own volition and have been known to attach themselves to a particular victim for many years. In the majority of occasions, the stalker is only stopped through legal intervention or the death of the victim.

Murder is often the end result of uninterrupted stalking behaviour. Until recently police have had little assistance in the way of research on matters such as: why people stalk others; who are the victims; and how we can identify the early patterns of behaviour to protect victims from emotional and physical abuse. Until recent legislation was enacted, police could do little to assist the victim except to provide advice on how to modify their behaviour.

Holmes (1994:89) agrees and believes '...little is known about this form of behaviour. We are only now beginning to understand this serious problem. The first step in understanding the stalker is to recognise his behaviour. Few people are safe from a predatory stalker'.

In 1990 California became the first state to introduce anti-stalking legislation in the United States. At the same time the Los Angeles Police Department (LAPD) came under increasing pressure to do something about the rising incidents of stalking complaints, particularly those relating to celebrities and officials.

As a result of the murder of actor Rebecca Schaeffer and the attempted murder of a television reporter/actor Theresa Saldana, the LAPD formed the Threat Management Unit (TMU). The TMU experience in dealing with stalking behaviours has shown that early assertive intervention is effective and crucial, particularly for the victims.

Stalking victims must establish boundaries of acceptable behaviour so they are able to determine what they will and will not tolerate from the suspect. Detectives of the TMU emphasise that ideally the victim is to have no contact with the suspect whatsoever. This prevents the possibility that the suspect may misinterpret the motivations of the victim in such contact.

The most common stalker typologies revealed by the TMU's research are:

Erotomania:

This is the delusional belief that one is passionately loved by another. Offenders suffering from this disorder often go to great lengths to contact the person of their delusion, usually either a person of higher socioeconomic status or an unattainable public figure. These attempts are sometimes so vigorous that eventually the offender comes to the attention of the criminal justice system.

Stated simply, the delusion is one of an idealised love, a 'perfect match'. The person is convinced that the object, usually of the opposite sex, fervently loves him or her, and would return the affection if not for some external influence. The erotomania offenders usually have a second psychiatric disorder such as schizophrenia, borderline personality disorder, or a mood disorder and symptoms tend to persist for around 100 months.

Love Obsessional:

There is no prior relationship between the suspect and the victim in the love obsessional group. Many in this group hold the delusion that they are loved by their victim. Others are obsessed with their love without them possessing the belief that the victim loves them.

These people often hold a variety of beliefs along a spectrum from hoping that their victim 'might love me if only given the chance' to 'they must become a goddess and be placed on a pedestal to be worshipped and admired'. The majority of suspects are male. Case examples include the stalking and murder of John Lennon by Mark Chapman and Rebecca Schaeffer by Robert Bardo. Love obsessional offenders have an obsession which averages around 34 months

Simple Obsessional:

Unlike the erotomania and the obsessional group, there exists a prior relationship between the subject and the victim. This prior relationship varies in degree of closeness: customer, acquaintance, neighbour, professional relationship, dating partner or lover. The majority of suspects are male.

In many cases obsessional activities begin after either the relationship has gone 'sour' or the perception by the subject of mistreatment. The person then begins a campaign either to rectify the schism or to seek some type of retribution.

The simple obsessional stalker is the most common type of stalker. The majority of simple obsessional offenders have a personality disorder and an obsession that averages around 13 months. The simple obsessional category continues to be the most dangerous stalker typology and the type that usually comes to the attention of police officers.

False Victimisation Syndrome:

This is the conscious or unconscious desire to be placed in the role of victim. People in this category represent a small percentage of those reported. The offender is usually female.

The Victims

Ordinary people can become victims of stalking but it only tends to be acknowledged when it concerns celebrity cases or it comes to the attention of the media. Victims of stalking live in a constant state of anxiety, apprehension and terror. Stalking is often an invisible crime until it becomes violent and can lead to other crimes like assault, rape and murder.

Simon defines stalking as 'psychological terrorism'. He states that the infliction of this type of terror campaign is usually the intention of the stalker. However, it can also be an unintentional consequence of the stalker's obsession itself (1996:63):

'No matter where the victim goes, she or he is at risk. It is difficult to appreciate the intensity of fear felt by victims for their lives. The horror is so intense and constant that it often defies our understanding and taxes our ability to empathise with the victim. The stalking victim gradually becomes the captive of the stalker'

Stalking victims can often experience difficulty in knowing when they have a problem, particularly if the stalker is known to them. There is usually a pattern of behaviour that many victims will experience when dealing with a stalker before they contact police. This can range from not wanting to hurt the stalkers feelings, expressing sympathy or understanding, placating them, to being more direct when their initial responses are not working.

By the time the victim makes contact with the police it is usually at the stage when the victim is feeling helpless, mentally exhausted and in a constant state of anxiety and fear.

Little is known about the long term effect stalking has on victims. Several studies have found that victims of violent crimes suffer from post traumatic stress disorder/syndrome. Many experts liken the effect that stalking has on victims to that experienced by victims of rape and/or sexual assault. Wallace and Silverman (1996:205) concur :

'The difference between rape and stalking is that a sexual assault is usually an isolated event that occurs one time, while stalkers engage in a repeated, often prolonged course of conduct that can last for years.'

Dr Park Deitz, a professor of forensic psychiatry at the University of California Los Angeles in the United States has researched and completed extensive studies of stalking and obsessive behaviour. Deitz estimates that one in twenty American women will become victims of stalking at some time in their lives, although he says this could be as high as one in five.

In Australia the figures show similar results to the USA studies, where it is acknowledged that over 80% of violence against women is perpetrated by someone they know, either through intimate partnerships or acquaintances. The QPS Domestic Violence Co-ordination Office collated stalking statistics that were entered on the Crime Reporting Information System for Police (CRISP) from 18 November 1993 to 16 June 1995. Data that was collected on over 240 entries revealed that 80% of unlawful stalking acts were committed by males and women comprised the majority of victims.

The difficulty with stalking cases is detection. Unfortunately potential stalkers don't wear warning signs indicating that they have an obsessive personality, so the intended victim needs to be aware of any behaviour changes, lack of privacy in a relationship and possessiveness, which should not be confused with love or caring. Until recent legislation was enacted, police could do little to assist the victim except to provide advice to the victim on how to modify their behaviour.

Stalking Legislation

Queensland was the first state in Australia to introduce unlawful stalking legislation in 1993 and to date all states in Australia have followed. Queensland's stalking legislation, based on California's legislation, essentially describes unlawful stalking as ... two or more 'concerning' acts directed at the victim. The victim is aware that the behaviour is directed at them and believes that a violent act against them could occur. The California legislation has been in place since 1990 and is continually being amended. There are a number of basic differences compared to our local statute.

The California statute provides for a protection/restraining order prohibiting the offender from contact with the victim. It can include the 'immediate family' of the victim and can be valid for up to 10 years depending on the seriousness of the offence. Immediate family includes: 'any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household'.

A corporate restraining order can be taken out by companies or government departments. This is an attempt to combat workplace violence by offering some form of protection to the victims and other employees. For example, the LAPD took out a corporate restraining order on a male police officer who had stalked female officers until he was arrested by the TMU.

If probation is granted to the offender or the sentence is suspended, a court can order the offender to attend counselling as part of the probation conditions. If the offender is convicted and a jail sentence is imposed by the court, a judge can if considered appropriate, recommend that the Department of Corrections evaluate and transfer the defendant to any appropriate hospital for treatment.

The Department of Corrections or the related authority in the jurisdiction must give notice by telephone and/or certified mail to the victim of no less than 15 days of the offender's pending release. This can also include any person deemed to be a family member pursuant to the legislation.

Queensland stalking does not allow for a restraining/protection order. It also does not provide for any of the options I have just outlined in California's anti-stalking legislation. At this stage if a stalking victim is not covered under the Domestic Violence (Family Protection) Act the only recourse is the Peace and Good Behaviour Act for obtaining a restraining order.

Having legislation in place does however provide a foundation for alleviating some of the potential for further violence directed towards victims. It also serves to raise community awareness and consciousness of the prevalence of stalking. However, this is not enough. It is imperative that education programs and training on the effect stalking has on victims be delivered to the community, government and police agencies alike, at all levels. The reality is, stalking is a formidable but not insurmountable problem that will not simply 'go away'.

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